Hotel and Restaurant Employees' and Bartenders' International Union, Local 274 *and* Hospitality Catering, Inc. t/a Warwick Caterers *and* Elan of Philadelphia Ltd. t/a Elan. Cases 4-CP-355, 4-CB-4477, and 4-CB-4478

28 March 1984

DECISION AND ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 18 April 1983 Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary issue before the Board is whether the judge properly concluded that the Respondent Union's recognitional picketing violated Section 8(b)(7)(C) of the Act. In so concluding, the judge held, as detailed below, that he was precluded from considering the Respondent's alter ego defense. If the Respondent's defense were found to have merit, all elements required to find a violation of Section 8(b)(7)(C) would not have been met. We agree with the Respondent that it is entitled to raise, and have considered, its defense to the unfair labor practice charges.

As found by the judge, Warwick Caterers is a banquet and catering operation owned and operated by Hospitality Catering, Inc. Steven Morgan is the president. Elan is a bar and restaurant, owned by a limited partnership, in which Hospitality Investments, Inc. is the general partner. Steven Morgan is also the president of Hospitality Investments, Inc. Both businesses are engaged in operations at the Warwick Hotel in Philadelphia, Pennsylvania. Elan and the Respondent Union have had a collective-bargaining relationship since 1979. Warwick Caterers is not a party to any collective-bargaining agreement with the Respondent. By letters dated 2 and 19 February 1982[1] the Union's attorney advised Steven Morgan of the Union's intent to establish a picket line to protest Hospitality Investments' avoidance of its alleged bargaining obligation.

On 22 February, the Union filed 8(a)(5), (3), and (1) unfair labor practice charges against Warwick Caterers, Elan, and Hospitality Investments, Inc., alleging, in essence, that these employers were successors to, or an alter ego of, R & K Caterers (Kosher Catering) and Warken Banquets, Inc. (non-Kosher catering), employers which, prior to the sale of assets to Warwick Caterers, had verbally agreed to pay union wage rates to their employees. The Union claimed that Warwick Caterers had a successorship or alter ego duty to recognize it. The charge also alleged discriminatory terminations of Warwick employees because of their union affiliation.

These charges were dismissed by the Regional Director, and the dismissal was later upheld by the General Counsel on appeal. In upholding the dismissal of the complaint, the General Counsel observed that there was no evidence that Warwick Caterers "was an alter ego of any of the parties who might arguably have had a bargaining relationship with the Union."

Contemporaneous with the filing of the charge, the Union invoked the arbitration provisions of its collective-bargaining agreement with Elan, "seeking to enforce the contractual obligation of recognition [on Warwick Caterers] as set forth in the collective bargaining agreement [between the Union and Elan.]"

On 24 February the Union began picketing which continued until it was enjoined on 14 June.

On 13 May Warwick Caterers filed a charge against the Union alleging violation of 8(b)(7)(C). A complaint issued, forming the basis for the instant case.

In order to find a violation of Section 8(b)(7)(C) we must find that a union (a) picketed an employer (b) with a recognitional or organizational objective (c) where it has not been currently certified as the collective-bargaining representative of that employer's employees and (d) where the picketing continues without a representation petition being filed with the Board within a reasonable period of time, not to exceed 30 days from the onset of the picketing.

The Respondent contends in its defense that factor (c), above, has not been established because it is an incumbent collective-bargaining representative by virtue of the alter ego or single-employer status between Elan and Warwick Caterers.

Relying on what he considered to be firmly settled Board law, and particularly *Food & Commercial Workers Local 576 (Earl J. Engle)*,[2] the judge stated he was precluded from even considering the Union's defense. Because the Respondent's contentions had been raised in the prior 8(a)(5) context

[1] All succeeding dates are 1982 unless otherwise noted.

[2] 252 NLRB 1110 (1980), enf. denied 675 F.2d 346 (D.C. Cir. 1982).

and were found to be without merit by both the Regional Director, who refused to issue a complaint, and the General Counsel, who sustained the dismissal of the charge, the judge concluded that the Respondent had violated Section 8(b)(7)(C).

In *Earl J. Engle*, the majority adopted the administrative law judge's decision, which held at 1114:

> Under Section 3(d) of the Act, the General Counsel has final authority over the issuance of unfair labor practice complaints. Consequently, to permit the Respondent to litigate its contentions under the guise of a defense in this matter would be to "create the undesirable situation of the Board's acting in practice as a forum for considering the content of charges which the General Counsel, for reasons satisfactory to himself, has thought it proper to dismiss." *Times Square Stores Corporation*, 79 NLRB 361, 365 (1948). This the Board has held it will not do in proceedings arising under Section 8(b)(7) of the Act. *Local 295, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Calderon Trucking Corp.)*, 178 NLRB 52, 54 (1969); *Service Employees' International Union, Local No. 227, AFL-CIO (Children's Rehabilitation Center, Inc.)*, 211 NLRB 982 (1974).

When presented with the petition for review and cross-application for enforcement of the Board's Order, the Court of Appeals for the District of Columbia Circuit denied enforcement. The court held that the Board's refusal to entertain a defense, which was premised on evidence that the General Counsel had previously considered in refusing to issue an unfair labor practice complaint against the employer, did not give the union the opportunity afforded by the National Labor Relations Act to defend itself. The court criticized the Board's interpretation of the statutory language in that (1) it overestimated the degree of interference with the General Counsel's authority, and (2) it disregarded the charged party's right to a full hearing on its defense and the Board's obligation to hear and adjudicate unfair labor practice complaints.

After careful reexamination and consideration, we have concluded that our prior interpretation of the statute needs to be abandoned in favor of an approach in line with that advanced by the circuit court. Accordingly, we have decided to overrule *Earl J. Engle*, supra. In reaching this conclusion, we agree with the court's construction of the statute which recognizes that allowing the Respondent to present its defense is not tantamount to reviewing the General Counsel's decision not to issue a complaint. As former Chairman Fanning observed in a similar case and in his dissent in *Engle*, "Our inquiry could not, of course, cause the General Counsel to reconsider any decision he may have made on the disposition of any charges that may have been filed . . . ." *Service Employees Local 227 (Children's Rehabilitation Center)*, 211 NLRB 982, 983 (1974).

We acknowledge that under Section 10(b), "The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony . . . ." Absent any limitation on these rights, the Board is bound to hear, receive, and consider the Respondent's answer at a trial-like hearing. The Regional Director's prior consideration and investigation of the earlier charge serves a more limited and discretionary function than the hearing necessary under the Act and cannot, therefore, serve as a replacement for the Board's adjudicatory responsibility.

Unlike the situation in *Engle*, where the administrative law judge sustained the General Counsel's motion to strike the defense and thus prevented the charged party from introducing any evidence in support thereof, the judge here permitted the Respondent to raise its defense on the record. Nevertheless, he felt that he was precluded from considering the defense in making his determination as to whether the Respondent had indeed violated Section 8(b)(7)(C) of the Act. If the judge had considered the defense and found merit therein, all elements of the 8(b)(7)(C) violation would not have been satisfied. Therefore, we shall remand this proceeding to the judge to consider what effect, if any, the Respondent's defense has on his findings and conclusions with respect to the Respondent's alleged unlawful conduct. Further, we will allow the judge, at his discretion, to reopen this proceeding for the limited purpose of obtaining additional evidence concerning the single-employer or alter ego status of the Charging Parties.

In light of the disposition of the 8(b)(7)(C) issue, we find it premature at this time to rule on the other issues raised by the case.

ORDER

The National Labor Relations Board orders that this proceeding be remanded to Administrative Law Judge Michael O. Miller for the purpose of considering the effect, if any, of the Respondent's defense on his findings and conclusions with respect to the alleged unlawful conduct. If, in his discretion, the judge deems that further hearing is desirable or necessary to enable him to determine any issue of fact bearing on the issues raised by this

remand, he shall arrange such further hearing and issue timely notice thereof.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand and on consideration of the Respondent's defense. Following service of such supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heard before me on January 26, 1983, in Philadelphia, Pennsylvania, based on unfair labor practice charges filed by Hospitality Catering, Inc. t/a Warwick Caterers (Warwick Caterers) and Elan of Philadelphia Ltd. t/a Elan (Elan),[1] and a consolidated and amended complaint issued by the Regional Director for Region 4 of the National Labor Relations Board (the Board) on November 23, 1982.[2] The consolidated complaint alleges that Hotel and Restaurant Employees' and Bartenders' International Union, Local 274 (Local 274 or the Union), violated Section 8(b)(1)(A), (2), and (3) and Section 8(b)(7)(C) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying the substantive allegations of the consolidated complaints and setting out certain affirmative defenses.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Respondent, and the Charging Parties.

Based on the entire record,[3] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT UNION'S LABOR ORGANIZATION STATUS AND JURISDICTION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, the Respondent admits, and I find and conclude that Respondent Local 274 is a labor organization within the meaning of Section 2(5) of the Act.

Warwick Caterers and Elan are Pennsylvania corporations engaged in food and liquor service operations at the Warwick Hotel in Philadelphia, Pennsylvania. Jurisdiction is not in dispute. The complaint alleges, and the Respondent admits, that each of them meets the Board's standards for the assertion of jurisdiction over retail and nonretail enterprises.[4] I therefore find and conclude that Warwick Caterers and Elan are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Nature and Structure of the Employers' Businesses*

Elan is a singles bar and restaurant located on the first floor of the Warwick Hotel. The bulk of its income comes from the sale of liquor but it also features an a la carte menu serving food prepared in its own kitchen. It is owned by a limited partnership in which Hospitality Investments, Inc. is the general partner. Elan and the Union have had a collective-bargaining relationship since at least April 1979. The current collective-bargaining agreement is effective from April 9, 1982, through April 8, 1985. Its recognition clause reads:

> The Employer, Elan Philadelphia, hereby recognizes the Union . . . as the exclusive bargaining representative for the unit that includes all waiters-waitresses, cocktail servers, bus persons, bartenders, bar backs, buffet runners, porters, room service persons, cooks, pantry persons, and utility employees, at its Hotel Warwick . . . location but excluding all office clerical employees, host-hostesses, front desk employees, reception desk employees, coat check employees, sales employees, chefs and assistant chefs . . . music programmers, guards and supervisors as defined in the Act.

Warwick Caterers operates the banquet facilities, consisting of five banquet rooms and two kitchens located on the second floor of the Hotel Warwick. Its principal income is derived from the sale and service of food from fixed banquet menus. The president of Warwick Caterers and Hospitality Investments, Inc. and Elan's general partner is Steven Morgan. He is also president of various other "Hospitality" business entities. Warwick Caterers had entered into an agreement to purchase this catering business, previously owned and operated by Warken, in mid-November 1981. Because of the delay necessitated by the transfer of liquor licenses, the sale by Warken to Warwick Caterers was not completed until January 26, 1982. From mid-November 1981 until the closing of that transaction, Warwick Caterers operated the catering service, replacing virtually all of the kitchen help but retaining, at Warken's request (because of the possibility that the deal would not be finalized), the service staff, i.e., the waiters, waitresses, and bartenders. When the transaction was finalized, those service employees were offered an opportunity to continue working for Warwick Caterers, but under different terms and conditions of employment, and they declined the offers.

[1] Warwick Caterers filed the charges in Cases 4–CP–355 and 4–CB–4477 on June 4 and 28, 1982, respectively. Elan filed the charge in Case 4–CB–4478 on June 28, 1982.

[2] The original complaint in Case 4–CP–355 issued on June 4, 1982.

[3] The General Counsel's unopposed motion to correct the record is granted.

[4] Gross revenues in excess of $500,000 and direct inflow of goods valued in excess of $50,000. The revenues and purchases of Warwick Caterers were alleged on a projected basis for the year beginning on January 26, 1982.

Warwick Caterers is not party to any collective-bargaining agreement with the Respondent Union. Neither has the Union ever filed a petition with the Board seeking the right to represent the employees of Warwick Caterers or been certified or recognized to represent those employees.

Warken, the firm from whom Warwick Caterers purchased the catering operation, had never executed a collective-bargaining agreement with Local 274. However, since 1978, when its operations at the Warwick Hotel began, the waiters and waitresses who were steadily employed by Warken were union members and Warken honored the economic obligations of the Union's contract with the Hotel and Restaurant Association. Warken also secured additional waiters and waitresses, as needed, through the Union. The president of Warken was also president of R & K Caterers, Inc., the kosher caterer at the Warwick Hotel. R & K, or Rosenthal and Kaufman, from whom R & K had purchased the kosher catering business, had a formal collective-bargaining agreement with the Union.

B. *The Events Commencing in December 1981*

In late December 1981, prior to the closing of the Warwick Caterers-Warken transaction, the Respondent's president, James Small, called Morgan, Warwick Caterers' president, and requested that Morgan sign a collective-bargaining agreement with the Union covering all of the employees of the nonkosher catering business, i.e., Warwick Caterers' operations, at the Warwick Hotel.

When the transfer of the business to Warwick Caterers was completed, Morgan replied to the Respondent stating that Warwick Caterers did not recognize it as the bargaining representative of its employees.

On February 2, 1982, the Respondent's counsel addressed a letter to Morgan accusing Warwick Caterers of having committed unfair labor practices and violations of the collective-bargaining agreements or obligations between Elan, Rosenthal and Kaufman, and/or Warken, and the Union. Picketing against Warwick Caterers and any others involved, the filing of unfair labor practice charges with the Board, and resort to arbitration were threatened. A second letter from counsel, dated February 19, 1982, was sent to Warwick Caterers, Elan, and others. That letter asserted that Warwick Caterers had violated Section 8(a)(1), (3), and (5) of the Act and advised that picketing against Warwick Caterers would commence on February 24, 1982.

On February 22, 1982, Local 274 filed unfair labor practice charges against Warwick Caterers, Elan, Hospitality Investments, Inc., Rosenthal and Kaufman, and the Warwick Hotel, Cases 4-CA-12714-1-5. In these charges, the Respondent alleged, in essence, that each of these employers was a successor to, or the alter ego of, R & K caterers and Warken Banquets, Inc., which employers had recognized Local 274 as the collective-bargaining representative of the banquet employees at the Warwick Hotel. They further charged that the alleged successors had discharged employees because of their union membership, had unilaterally changed the terms and conditions of employment, and had refused to continue recognition of the Union as collective-bargaining representative.

Essentially contemporaneous with its filing of unfair labor practice charges, Local 274 invoked the arbitration provisions of its collective-bargaining agreement with Elan, "seeking to enforce the contractual obligation of recognition [upon Warwick Caterers] as set forth in the collective-bargaining agreement [between the Union and Elan]." Elan objected to arbitration of the issues posed by the Union, contending that the subject matter was not arbitrable and that arbitration would be improper inasmuch as the Respondent's forcing of the matter to arbitration would constitute an unfair labor practice.

On February 24, 1982, the Union commenced its picketing of Warwick Caterers. During the period of the picketing, the Local 274's pickets displayed at least one sign which read:

HOSPITALITY INVESTMENTS, INC.
BANQUETS—UNFAIR
DO NOT PATRONIZE
LOCAL 274
HOTEL & RESTAURANT EMPLOYEES' AND
BARTENDERS' INTERNATIONAL UNION
AFL-CIO

The pickets also distributed leaflets which accused Warwick Caterers of taking "steps to displace unionized workers, destroy unionized conditions, and unilaterally repudiate a relationship which has existed for many years . . . Union Busting . . . ." When he asked Small what was required for the removal of the pickets, Morgan was told that "the pickets would be up there forever until we signed a contract."

The picketing continued until it was enjoined by order of the United States District Court, pursuant to Section 10(1) of the Act, on June 14, 1982.[5]

On April 30, 1982, the Respondent's unfair labor practice charges were dismissed by the Regional Director for Region 4. The Regional Director found that there was insufficient evidence to establish that Warwick Caterers had unlawfully refused to recognize and bargain with the Union inasmuch as Warken had not maintained an actual collective-bargaining relationship with the Union and that, under these circumstances, Warwick Caterers was not a successor to Warken with a statutory obligation to recognize the Union as the bargaining representative of its employees. The Regional Director further found that Warwick Caterers was privileged to establish different terms and conditions of employment when it took over the catering operation, to inform the employees that it was not going to recognize and bargain with the Union, and to require new applications for employment. The employees, it was found, elected not to apply for employment with Warwick Caterers. Thus, he stated, "there was no basis for concluding that the employer discriminated against former Warken employees because of their union membership or activities." The Regional Director further found that there was no evidence to estab-

[5] *Hirsch v. Hotel & Restaurant Employees Local 274*, Civil No. 82-2390.

lish that Rosenthal and Kaufman, Elan, and the Warwick Hotel were joint employers with, or alter egos of, Warwick Caterers. He therefore refused to issue a complaint.[6] The Respondent appealed the dismissal of its charges to the Board's General Counsel. That appeal was denied on June 7, 1982. In consideration of that appeal, the General Counsel found that violations of the Act could not be established even if Rosenthal and Kaufman, R & K Caterers, and Warken were alter egos and even if there was a collective-bargaining relationship between the Union and one or more of these alter egos. That conclusion was based on the absence of evidence to support the contention that Warwick Caterers was an alter ego of Rosenthal and Kaufman, R & K Catering, Inc., or Warken. Neither could it be established, the General Counsel found, that Warwick Caterers was a successor of Warken. Finally, the General Counsel noted the absence of any evidence that Warwick Caterers "was an *alter ego* of any of the parties who might arguably have had a bargaining relationship with the Union."[7]

A hearing before Arbitrator Joseph M. Stone, on the Union's demand for arbitration under its agreement with Elan, was held on October 18, 1982. Both parties filed briefs with respect to the threshold issue of arbitrability and, on November 30, 1982, Arbitrator Stone issued his decision in regard to that preliminary question, finding that the grievance was arbitrable and that the Union was entitled to a hearing on the merits.[8] No decision has as yet issued on the merits of the Union's claim.

C. *Analysis and Conclusions*

1. 8(b)(7)(C) violation

The General Counsel contends, and I agree, that the Respondent's picketing of Warwick Caterers from February 24 through June 14, 1982, violated Section 8(b)(7)(C) of the Act. That section prohibits a union from: (a) picketing an employer; (b) with a recognitional or organizational objective; (c) where it has not been currently certified as the collective-bargaining representative of that employer's employees; (d) where the picketing continues without a representation petition being filed with the Board under Section 9(c) of the Act within a reasonable period of time, not to exceed 30 days from the onset of the picketing.

It is undisputed that the Respondent's picketing lasted more than 30 days and that no petition was ever filed. Moreover, it cannot be seriously disputed either that the picketing was directed against Warwick Caterers, an employer, or that *an* object of its picketing,[9] as established by Small's statements to Morgan as well as the language of the Respondent's unfair labor practice charges and demands for arbitration, was organizational or recognitional.[10] Thus, all elements essential to the establishment of an 8(b)(7)(C) violation are present herein.

The Respondent, however, contends that Warwick Caterers and Elan constitute a single employer and that the employee complement of Warwick Caterers constitutes an accretion to the Elan-Local 274 bargaining unit. Thus, it argues, the Union is an incumbent collective-bargaining representative entitled to picket for continued recognition without running afoul of the proscriptions of Section 8(b)(7)(C).[11] I am, I believe, precluded by Board precedent from considering this defense. The matters which the Respondent now asserts to establish that it was an incumbent collective-bargaining representative formed the basis of its charges against Warwick Caterers, Elan, Rosenthal and Kaufman, and others. These charges were dismissed and the dismissals were sustained by the General Counsel on appeal.[12] Board law is clear:

> . . . only a meritorious refusal-to-bargain charge exempts a picketing labor organization from the requirement that it file a representation petition before engaging in prolonged picketing, and, if such a charge has been filed but dismissed by the General Counsel, the matter may not be raised as a defense to an alleged violation of subdivision (C) of Section 8(b)(7) of the Act.

Earl J. Engle, supra at 1114. The Board reasoned therein:

> Under Section 3(d) of the Act, the General Counsel has final authority over the issuance of unfair labor practice complaints. Consequently, to permit Respondent to litigate its contentions under the guise of a defense in this matter would be to "create the undesirable situation of the Board's acting in practice as a forum for considering the content of charges which the General Counsel, for reasons satisfactory to himself, has thought it proper to dismiss." *Times Square Stores Corporation*, 79 NLRB 361 365 (1948). This the Board has held that it will not do in proceedings arising under Section 8(b)(7) of the Act. *Local 295, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen*

[6] The April 30, 1982 dismissal letter is attached hereto as Appendix 1.

[7] The June 7, 1982 denial of the Respondent's appeal is attached hereto as Appendix 2.

[8] On June 15, 1982, the Union also sought arbitration under an alleged agreement between it and R & K Caterers, asserting that there had been unlawful subcontracting of bargaining unit work and a breach of the recognition and successorship clauses of that contract. It sought to consolidate that arbitration with the arbitration proceeding under the Elan agreement. The record does not reflect the disposition of this demand.

[9] It is sufficient that only one object, and not necessarily the sole object of the picketing, be recognitional or organizational. *Local 840 (Blinne Construction)*, 135 NLRB 1153, 1167 (1962).

[10] *Carpenters Local 1260 (Selzer Construction)*, 210 NLRB 628 (1974). See also *McClintock Market, Inc.*, 244 NLRB 555 (1979).

[11] The Respondent correctly sets forth this legal principle. See Santa Barbara *Building Trades Council (Sullivan Electric)*, 146 NLRB 1086, 1087 (1964), wherein the Board concluded that Sec. 8(b)(7)(C) was intended only "to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of this union as the bargaining representative of his employees." See also *Foods & Commercial Workers Local 576 (Earl J. Engle)*, 252 NLRB 1110, 1112 (1980).

[12] The Respondent's contention that the charges and resultant dismissals dealt only with the alleged successorship relationship between Warwick Caterers and Rosenthal and Kaufman is without merit. The Regional Director's dismissal, in its penultimate paragraph, concluded that there was no evidence to establish that Elan was a single employer with, or alter ego of, Warwick Caterers (referred to in that letter as Hospitality Catering). Similarly, the General Counsel concluded that there was no evidence to establish that Warwick Caterers was an alter ego "of any of the parties who might arguably have had a bargaining relationship with the Union. . . ."

and Helpers of America (Calderon Trucking Corp.), 178 NLRB 52, 54 (1969); *Service Employees' International Union, Local No. 227, AFL-CIO (Children's Rehabilitation Center, Inc.)*, 211 NLRB 982 (1974).

Additionally, the Board rejected the employer's contention that there existed a meaningful difference between seeking a finding of violation after the General Counsel has sustained the dismissal of unfair labor practice charges and merely raising the issue by way of a defense to the 8(b)(7)(C) complaint.

As the Respondent noted, the Board's *Engle* decision was denied enforcement in the Circuit Court of Appeals for the District of Columbia, *Food & Commercial Workers Local 576 v. NLRB*, 675 F.2d 346 (1982). The administrative law judge is, however, obligated to follow applicable Board precedent unless and until reversed by the Supreme Court. *Fred Jones Mfg. Co.*, 239 NLRB 54 (1978). Accordingly, based on all of the foregoing, I must conclude that by the picketing described above, the Respondent has violated Section 8(b)(7)(C) of the Act.

2. 8(b)(1)(A), (2), and (3) violations

The record clearly establishes that the Respondent has insisted upon arbitration, under the terms of its agreement with Elan, for the express purpose of including the employees of Warwick Caterers under that contract. By such conduct, the General Counsel contends, the Respondent has insisted upon broadening the collective-bargaining unit beyond that to which the parties had voluntarily agreed in violation of Section 8(b)(3). Additionally, as the Union's demand would require application of the entire Elan-Local 274 contract, including its union-security provisions,[13] to the employees of Warwick Caterers, the General Counsel contends that the Union's actions are violative of Section 8(b)(1)(A) and (2). In agreement with the General Counsel, I find that the applicable Board precedent fully supports these contentions.

In order for the Respondent to prevail herein, one would have to find that it was correct in contending that the employees of Warwick Caterers were accreted to the Elan bargaining unit. See *Retail Clerks Local 588 (Raley's)*, 224 NLRB 1638, 1640 (1976); *Hershey Foods Corp.*, 208 NLRB 452 (1974). In order for such a conclusion to be made, one would have to find, inter alia, that Elan and Warwick Caterers constituted a single employer. Such a finding is precluded by the actions of the Regional Director and the General Counsel, herein, dismissing and sustaining the dismissal, respectively, of those very contentions. *Earl J. Engle*, supra.

In *Raley's*, supra, an employer's foodstore and drug center employees were separately represented, with one union having been certified by the Board as the collective-bargaining representative of the drug center employees. When the employer made certain changes in store layout, removing some elements which had separated the two groups, the union which represented the foodstore employees attempted, by insistence upon arbitration of its claim, to apply the terms of its agreement, including the union-security clause, to the drug center employees. The Board, finding that the drug center employees retained a separate community of interest and remained an appropriate separate unit for collective bargaining, found that there had been no accretion and concluded (at 1641):

> Accordingly, we find that the Respondent Union's insistence upon arbitration to compel recognition of it as the representative of Raley's drug center employees was, and is, in the circumstances of this case, in insistence upon bargaining for an inappropriate unit breach of the Respondent's obligation to bargain in good faith. The Respondent's conduct thus was, and is, violative of Section 8(b)(3) of the Act.
>
> Further, we find that, by insisting upon the application of its entire contract, including the union-security provision, to Raley's drug center employees, the Respondent Union has attempted and is attempting to cause Raley's to discriminate against the aforesaid employees in violation of Section 8(b)(2). We find that the aforesaid conduct has the effect of restraining and coercing those employees in violation of Section 8(b)(1)(A).[11]

[11] Cf. *Smith Steel Workers, Directly Affiliated Labor Union 19806, AFL-CIO (A. O. Smith Corporation)*, 174 NLRB 235, 241-242 (1969).

It is of no significance that the bargaining unit or units involved herein were the result of voluntary recognition rather than Board certification. In *Electrical Workers IBEW Local 323 (Active Enterprises)*, 242 NLRB 305, 307-308 (1979),[14] the Board held:

> . . . Respondent could not lawfully insist that the residential and commercial units be combined, without the consent of the Employers, under the terms and conditions of the inside agreement. For the Board has stated that:
>
> > . . . it is well established that the integrity of a bargaining unit, whether established by certification or by voluntary agreement of the parties, cannot . . . be unilaterally attacked. The conduct of negotiations on a basis broader than the established bargaining unit is nonmandatory, and the Respondents' insistence that the Charging Party

[13] The record contains no support for the Respondent's contention that it was not necessarily seeking to apply the union-security clause to these employees.

[14] The Respondent's contention that the *Active* decision is factually distinguishable from the instant case must be rejected. The Respondent argued that the existence of two separate bargaining units, with separate agreements, in *Active* "is quite clearly different from a situation in which an employer establishes a new operation in the same building as its old operation and the union seeks to have the new operation included in the bargaining unit through arbitration." In fact, this employer did not establish "a new operation." Rather, it acquired an existing business (Warken), the employees of whom had always been considered by the Union to comprise a separate bargaining unit. Indeed, the Union has contended that the Warken employees were covered by a collective-bargaining agreement separate from the Elan agreement and has sought arbitration under that agreement of its accretion and successorship allegations.

engage in such bargaining was violative of the Act.[10]

[10] *G.B. Curry, President; International Union of Operating Engineers, Local No. 428, et al.*, 184 NLRB 976, 977 (1970), enforcement denied on other grounds 459 F.2d 374 (3d Cir. 1972), petition for modification of opinion granted 470 F.2d 722 (3d Cir. 1972).

The Respondent contends that under the principles of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board should defer to the decision which the arbitrator has rendered herein. As the Respondent noted in its brief, "To decide that the arbitration can proceed and that the National Labor Relations Act is no bar to the arbitration proceeding is tantamount to deciding that the arbitration is not an unfair labor practice."

The "threshold questions" considered by the arbitrator were: "whether the subject matter raised by the Union is arbitrable and even if it is, whether proceeding with the arbitration would be an unfair labor practice in violation of Section 8(b)(1)(A), (2) and (3) of the National Labor Relations Act." The arbitrator concluded "that the Union's claim is arbitrable," predicating his finding on his concurrence with the contentions of the Union regarding the basic issues:

> . . . whether under the Recognition Clause the terms of the collective bargaining agreement covering the Elan employees must be applied to the catering employees, that the determination of the validity of such contention involves a matter "in controversy or dispute, arising out of the interpretation or application of this Agreement" in view of the Company's argument that the Recognition Clause only applies to employees of Elan and not the employees of any other employer and that even if a representational issue is thereby presented nevertheless the matter remains arbitrable under the rationale of the Supreme Court's decision in *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261 (1964).

Based on the *Carey v. Westinghouse* decision, he rejected the contention that the Board's jurisdiction over representation matters is exclusive.

The Respondent's arguments for *Spielberg* deferral must be rejected. The issue ultimately to be decided by the arbitrator is one of accretion and, as to the authority to resolve such issues, the Board precedent is clear: "where union accretion is in issue, [the Board] will not eschew its statutory obligation to decide that issue itself." *Hershey Foods*, supra, 208 NLRB 452, 457, and cases cited therein.[15] Additionally, I would note that the arbitrator's decision, to the extent that it constituted a conclusion that the Union's demand for arbitration was not an unfair labor practice, was in direct conflict with clear Board precedent, cited above, and with the determination of the Board's General Counsel who had authorized complaint upon that very issue before the arbitrator had reached his decision. To the extent that the arbitrator's decision implies the authority to determine that Elan and Warwick Caterers were alter egos or that a successorship relationship existed, it further conflicts with the General Counsel's earlier contrary determination. If the Board is precluded by Section 3(d) of the Act from going behind such determinations (*Earl J. Engle*, supra) an arbitrator's award which purports to do so would be contrary to the policies of the Act, repugnant to both those policies and controlling Board precedent, and therefore not subject to *Spielberg* deferral.

Additionally, I must reject the Respondent's argument that the charges herein are premature because the arbitrator, in ruling upon the underlying issue, might grant a remedy which does not conflict with Board precedent. As the Board's decision in *Raley's*, supra, makes clear, it is the adamant insistence upon arbitration and the attempt to compel application of the collective-bargaining agreement to employees outside the contractural unit which comprises the violations. It is not required that an arbitration award have been issued or that the Union be seeking to compel compliance with such an award.

Accordingly, I find that by insisting upon arbitration to compel recognition of it as the representative of Warwick Caterers' employees, the Respondent has insisted upon bargaining for an inappropriate unit in breach of its obligation to bargain in good faith, in violation of Section 8(b)(3) of the Act. I further find that by insisting upon application of its entire agreement with Elan to the Warwick Caterers' employees, including the union-security provision contained therein, the Respondent has attempted, and is attempting, to cause Warwick Caterers to discriminate against those employees in violation of Section 8(b)(2) of the Act, and that by all of the aforesaid conduct it has restrained and coerced employees in violation of Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. By picketing Warwick Caterers from February 24 to June 14, 1982, with an object of forcing or requiring Warwick Caterers to recognize and bargain with it as the collective-bargaining representative of the employees of Warwick Caterers or forcing or requiring those employees to accept or select it as their collective-bargaining representative without being certified as the collective-bargaining representative of those employees and without a petition under Section 8(c) of the Act being filed within a reasonable period of time, Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, has engaged in unfair labor practices within the meaning of Section 8(b)(7)(C) of the Act.

2. By attempting to apply its collective-bargaining contract with Elan, including the union-security provisions thereof, to the employees of Warwick Caterers, Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, has violated Section 8(b)(2) of the Act.

3. By assisting upon recognition as the representative of Warwick Caterers' employees, under the terms of its collective-bargaining agreement with Elan, the Respondent, Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, has insisted and is insist-

[15] See also *Smith Steel Workers Local 19806 (A. O. Smith Corp.)*, 174 NLRB 235, 241 (1969), where similar arguments concerning the effect of *Carey v. Westinghouse* were asserted and rejected.

ing upon bargaining for an inappropriate unit and, therefore, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3) of the Act.

4. By the aforesaid conduct, the Respondent, Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, has restrained and coerced, and is restraining and coercing, employees in violation of Section 8(b)(1)(A) of the Act.

5. The unfair labor practices found herein are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that the Respondent Union has engaged in unfair labor practices, as set forth above, I shall recommend that it be ordered to cease and desist therefrom, and from like and related unfair labor practices, and that it be required to take certain affirmative action found necessary to effectuate the policies of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[16]

ORDER

The Respondent Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing or causing to be picketed, or threatening to picket or cause to picketed, Warwick Caterers where an object thereof is forcing or requiring said Employer to recognize or bargain with it as the representative of its employees in violation of Section 8(b)(7)(C) of the Act.

(b) Insisting that Warwick Caterers recognize and bargain with the Respondent as the representative of Warwick Caterers' employees.

(c) Filing or attempting to file grievances against Warwick Caterers or demanding that Warwick Caterers arbitrate any grievance over its demand for recognition as the exclusive collective-bargaining representative of Warwick Caterers' employees.

(d) Filing or attempting to file grievances against Warwick Caterers or demanding that Warwick Caterers arbitrate any grievance concerning the application of the Respondent's collective-bargaining agreement with Elan, including the union-security provision thereof, to the employees of Warwick Caterers.

(e) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following action which is deemed necessary to effectuate the policies of the Act.

(a) Withdraw the grievances and arbitration demands it filed which seek to compel Warwick Caterers to apply the terms of the Elan or Rosenthal and Kaufman collective-bargaining agreements to the employees of Warwick Caterers.[17]

(b) Post at its business offices and meeting halls in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix 3."[18] Copies of said notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 4 signed copies of the attached notice marked "Appendix 3" for posting by Warwick Caterers, the latter willing, at its premises in Philadelphia, Pennsylvania, in places where notices to employees are customarily posted. Copies of the notice, to be furnished by the Regional Director for Region 4, after being signed by the Respondent's representative, shall be returned forthwith to the Regional Director for such posting.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX 1

(LETTERHEAD OMITTED)

April 30, 1982
C. No. 778446 RRR

Ira Silverstein, Esquire
1200 Lewis Tower Building
Philadelphia, PA 19102

Warwick Caterers c/o Warwick Hotel
Case No. 4–CA–12714–1

and

Hospitality Investments, Inc.
Case No. 4–CA–12714–2

and

R & K Caterers, Inc.
Case No. 4–CA–12714–3

and

Elan Restaurant c/o Warwick Hotel
Case No. 4–CA–12714–4

and

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[17] See *Service Employees Local 32B-32J (Allied Maintenance Corp.)*, 258 NLRB 430 (1981).

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Warwick Hotel
Case No. 4–CA–12714–5

Dear Mr. Silverstein:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, I find that the charges lack merit. With respect to the charges against Hospitality Investments, Inc. d/b/a Warwick Caterers in Cases No. 4–CA–12714–1 and 4–CA–12714–2, there was insufficient evidence to establish that the Employer, following its purchase of Warken Corporation d/b/a Warwick Banquets, unlawfully refused to recognize and bargain with the Union. The investigation disclosed that the Union did not enjoy a true collective bargaining relationship with Warken Corporation. See *Glenlynn, Inc.*, 204 NLRB 299. Thus, it was noted that Warken Corporation did not have a written collective bargaining agreement with the Union, did not deduct Union dues, did not, except for a brief period in 1979, make Health and Welfare payments to the Union, was not a party to the 1981 negotiations for a new collective bargaining agreement between the Philadelphia Hotel-Motor Inn Association and the Union, and did not grant employees the wage increase called for in that agreement. In these circumstances, it was concluded that Hospitality was not a successor to Warken and that there was no statutory obligation on the part of Hospitality to recognize the Union as the bargaining representative of its employees. With respect to the Section 8(a)(3) allegations, it was concluded that, in the circumstances referred to above, the Employer, upon taking over the catering operation involved, was privileged to establish different terms and conditions of employment, to inform the employees that it was not going to recognize and bargain with the Union and to require the employees to apply for employment. The investigation disclosed that none of the former Warken employees elected to apply for employment with Hospitality. In these circumstances, there was no basis for concluding that the Employer discriminated against former Warken employees because of their Union membership or activities.

With respect to Case No. 4–CA–12714–3 filed against Rosenthal & Kaufman, Case No. 4–CA–12714–4 filed against Elan Restaurant, and Case No. 4–CA–12714–5 filed against Warwick Hotel, there was no evidence to establish that these Employers were either joint employers with, or alter egos of, Hospitality. Accordingly, I am refusing to issue Complaint in these matters.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

PETER W. HIRSCH
Regional Director

(Services omitted)

APPENDIX 2
(LETTERHEAD OMITTED)

June 7, 1982
Re: Warwick Caterers c/o Warwick Hotel
Case No. 4–CA–12714–1

Hospitality Investments, Inc.
Case No. 4–CA–12714–2

R & K Caterers, Inc.
Case No. 4–CA–12714–3

Elan Restaurant c/o Warwick Hotel
Case No. 4–CA–12714–4

Warwick Hotel
Case No. 4–CA–12714–5

Ira Silverstein, Esq.
1200 Lewis Tower Building
Philadelphia, Pennsylvania 19102

Dear Mr. Silverstein:

Your appeal in the above captioned matter has been duly considered.

The appeal is denied. It was concluded that even assuming, *arguendo*, the existence of an alter-ego relationship among Rosenthal and Kaufman, R & K Caterers, Inc., and Warken Corp., and even assuming, further, the existence of a collective bargaining relationship between the Union and one or all of the alleged alter-egos, a violation of the Act, as encompassed by the charges, could not be established.

There was no evidence to support the contention that the ultimate operator of the Warwick Hotel banquet catering facilities, Hospitality Catering, Inc., was an alter-ego of Rosenthal & Kaufman, R & K Catering, Inc., or Warken. On November 13, 1981, Warken Corp. and Hospitality Catering, Inc. entered into an *Agreement for the Sale and Purchase of Assets*, which sale consisted of Warken's catering business conducted at the Warwick Hotel. The "Agreement for Sale" was contingent upon several factors, particularly approval of a liquor license for Hospitality. The understandings between Hospitality and Warken Corp. included the agreement not to disturb the employment [of] the serving personnel, ("chain gang") until the transfer of title several months in the future. On January 22, 1982, at the time of or shortly before the transfer of title and at the first point in time when Hospitality was contractually permitted to implement its own employment practices, an Employer spokesperson met with the Warken serving personnel, related to them the proposed pay scale that would be applicable to their positions and offered them an opportunity to apply for employment with Hospitality on those terms, which they refused. Moreover, contrary to your contention on appeal, evidence obtained from unit members present during the announcement fails to support your allegation that, "the employer told his employees that they could not remain there if they wished to be union." Accordingly, inasmuch as this refusal of the offer to apply for employment meant that the Union was unable to establish that it represented a majority of Hos-

pitality's employees, no successorship could be established. *Tallakson Ford, Inc.*, 171 NLRB 503.

Inasmuch as the Act permits an employer who purchases a business with an extant collective agreement to set initial terms and conditions of employment, and noting the absence of evidence that Hospitality Catering, Inc., was an alter-ego of any of the parties who might arguably have had a bargaining relationship with the Union, and finally noting that the Union has failed to establish that it represents a majority of Hospitality's employees, it was concluded that a violation of the Act could not be established. Accordingly, further proceedings were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By
Mary M. Shanklin
Acting Director
Office of Appeals

(Services omitted)

APPENDIX 3

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT under conditions prohibited by Section 8(b)(7)(C) of the Act picket or cause to be picketed, or threaten to picket or cause to picketed, Hospitality Catering, Inc. t/a Warwick Caterers, where an object thereof is to force or require said employer to recognize or bargain with us as the representative of its employees or to force or require employees of said employer to accept and select us as their collective-bargaining representative.

WE WILL NOT insist that Warwick Caterers recognize and bargain with us as the representative of its employees.

WE WILL NOT insist upon application of our collective-bargaining agreement with Elan of Philadelphia Ltd., t/a Elan, including the union-security provision thereof, to the employees of Warwick Caterers.

WE WILL NOT file or attempt to file grievances against Warwick Caterers or Elan or demand that Warwick Caterers or Elan arbitrate any grievance over recognition of Hotel and Restaurant Employees' and Bartenders' International Union, Local 274, as exclusive bargaining representative of the employees of Warwick Caterers or demand that those employers arbitrate any grievance concerning the application of our Elan collective-bargaining agreement, including the union-security provision thereof, to the employees of Warwick Caterers.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that those rights may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

WE WILL withdraw the grievances and arbitration demands we filed, which seek to compel Warwick Caterers to apply the terms Elan or Rosenthal and Kaufman agreements to the employees of Warwick Caterers.

HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION, LOCAL 274